IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1371

JOHNNIE M. WALTERS, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

"AMERICANS UNITED" INC., ETC., *et al.*,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ALAN B. MORRISON
Room 515 - 2000 P Street, N.W.
Washington, D.C. 20036

FRANKLIN C. SALISBURY
Room 409 - 1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

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QUESTION PRESENTED

Do the Anti-Injunction Act, 26 U.S.C. §7421, and the Declaratory Judgment Act, 28 U.S.C. §2201, absolutely bar an educational organization, which has had its status as a 501(c)(3) charitable organization revoked by the Internal Revenue Service, from challenging the constitutionality of the statute under which the revocation took place by a direct action in the district court to enjoin the enforcement of that statute, when the issue presented is fundamentally irrelevant to any determination of tax liability for that organization?

RESPONDENT'S STATEMENT

In 1950 respondent "Americans United", incorporated as Protestants and Others Americans United for Separation of Church and State, was granted a ruling by the Internal Revenue Service that as a non-profit educational corporation, it was exempt from income taxation under Section 101(6) of the Internal Revenue Code of 1939, the predecessor of Section 501(c)(3) of the present code, and that contributions to it were deductible under Section 23(o)(2) of the 1939 code which is now Section 170(c)(2). In 1958 the Service began an investigation of respondent and eventually concluded that in connection with its program to maintain the separation of church and state, it had engaged in substantial attempts to influence legislation and that it was no longer eligible to retain its status under Sections 501(c)(3) and 170(c)(2). Accordingly, by letter dated April 25, 1969, the Service revoked the 1950 ruling, but permitted respondent to continue its exemptions from income taxation as a social welfare organization under Section 501(c)(4).

However, the revocation had the immediate and substantial effect of greatly reducing contributions to respondent, since donors could no longer be assured of deducting contributions to it under Section 170(c)(2), with the result that for the first time in its history, respondent operated in fiscal 1970 at a deficit. Therefore, on July 30, 1970, respondent and two contributors brought suit in the United States District Court for the District of Columbia challenging the lawfulness of the ruling revocation, principally on constitutional grounds. The complaint sought the convening of a three judge court under 28 U.S.C. §2282, to enjoin enforcement of the portions of Sections 170(c)(2) and 501(c)(3) relied upon by the Service in revoking respondent's ruling.

Petitioner's response was a motion to dismiss the complaint on the grounds that both the Anti-Injunction Act, 26 U.S.C. §7421, and the Declaratory Judgment Act, 28 U.S.C. §2201, specifically preclude the district court from assuming jurisdiction in this case, and therefore it was improper even to convene a three judge court to consider the constitutional question presented. The district court agreed and dismissed the complaint for those reasons, and in addition found the absence of a substantial constitutional question. On appeal, the United States Court of Appeals for the District of Columbia unanimously reversed the lower court's ruling, holding that in this case nothing in the Anti-Injunction Act or the Declaratory Judgment Act precluded the maintenance of a suit challenging the constitutionality of the revocation of a 501(c)(3) ruling by the organization whose ruling is revoked.[1] The Court also found that there was a substantial constitutional issue raised by respondent, and it remanded the action for the convening of a three judge court to consider the merits of the controversy.

RESPONDENT'S POSITION WITH RESPECT TO THE GRANTING OF THE WRIT

The decision of the Court of Appeals is clearly correct and should be affirmed. Contrary to the contentions of petitioner, it does not constitute a "serious threat to federal tax administration in general and to the advance rulings program in particular" (Pet. p. 7), since, as the Court of Appeals recognized, the decision creates a narrow category of instances in which judicial review may

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[1] It affirmed the district court with respect to the individual donors, and no petition for a writ of certiorari has been filed with respect to that portion of the court's decision.

be invoked other than by way of a suit for refund or petition in the tax court (App. B. pp. 34-35). In the lower courts petitioner had contended that since respondent was exempt from income taxation under Section 501(c)(4), the method to challenge the ruling revocation was by a suit brought by a contributor who was denied a charitable deduction for his gift to respondent. That position has apparently now been abandoned, and petitioner contends that the proper method to raise the issue of the constitutionality of applying the antilobbying provisions of Sections 501(c)(3) and 170(c)(2) to respondent is in an action by respondent contesting the legality of imposing employment taxes (F.U.T.A.) which are not imposed against 501(c)(3) organizations but are imposed against 501(c)(4) groups (Pet. pp. 4, 8, 10 n. 3). This position, which was first taken by the Government in its Supplemental Memorandum on appeal filed in August 1972, just three weeks before oral argument and years after these proceedings began, was found by the Court of Appeals to be "so far from the mainstream of the action and relief sought as to hardly be considered adequate" (App. B. p. 32, n. 13). The Court also noted the uncertainty of even that procedural device and quite correctly decided that it made no sense to litigate the constitutionality of federal income tax laws in a suit involving the payment of unemployment taxes.

Had the unemployment tax issue been timely presented, the record would have contained far more on the question of the inadequacy as well as the inappropriateness of the remedy suggested. In any event it is apparent that nothing in either the Anti-Injunction or the Declaratory Judgments Acts would be violated by permitting the maintenance of a direct action raising the constitutional issues in this case rather than requiring the

respondent to take a chance on being able to have the issue determined in an irrelevant suit involving unemployment taxes. Apparently petitioner does not now dispute that respondent, rather than merely a donor, has a right to obtain a judicial determination of this question, but he claims that the unemployment tax suit is the exclusive vehicle. We respectfully suggest that the Court of Appeals correctly dismissed such remedy as inadequate, and its decision should thus be affirmed.

Respondent does not dispute that the decision below is in apparent conflict with the results in several other similar cases in other circuits (Pet. pp. 9-10). While there are certain arguable distinctions between at least some of those cases and this, the differences are such that it would be helpful to all concerned to have the issues resolved and have this Court articulate the differences, if any, which warrant different outcomes on the jurisdictional issue.

Respondent does not agree, however, that the decision below either conflicts with *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962) (Pet. pp. 8-9), or that it would unduly burden the administration of the tax laws (Pet. pp. 11-13). In *Enochs* this Court in no way purported to decide for all time, that the only exemptions to the Anti-Injunction and Declaratory Judgment Acts were described in that opinion. Cases of this kind were simply not before this Court in *Enochs*, and nothing contained in it is inconsistent with the decision of the Court of Appeals here.

Petitioner's claim that the decision below will disrupt the operations of the Service's rulings program is also without merit. Petitioner does not deny that respondent has the right to review the revocation of its ruling; his quarrel is with the procedure chosen. Thus, disruption, if there be any, will occur, and the only question is the

form of the lawsuit in which the constitutional question is to be raised. Moreover, since it is the Department of Justice and not the Internal Revenue Service which must defend these cases, the burden will not fall on the rulings branch which will simply go about its business of deciding questions presented to it and passing on those decisions to the taxpayer, and, if a defense is required, to the Justice Department. Since the only "tax" at issue is the small amount due on unemployment payments—$981.13 for respondent on February 19, 1970 (Pet. p. 4, n. 2)—it is obvious that no great disruption of the revenue will result from the decision of the Court of Appeals. That Court recognized this potential for revenue interference and, we suggest, correctly discounted the "flood gates" argument (App. B. p. 35).

CONCLUSION

Although respondent contends that the decision below is entirely correct and should be affirmed, it recognizes that there are apparent conflicts between that decision and some in other circuits. Therefore, respondent does not oppose the granting of the writ to consider the jurisdictional question, but it does strongly urge the Court to affirm the decision below.[2]

Respectfully submitted,

ALAN B. MORRISON
Room 515 - 2000 P Street, N.W.
Washington, D.C. 20036

FRANKLIN C. SALISBURY
Room 409 - 1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

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[2]Since petitioner has not raised the propriety of the decision below with respect to its holding that a substantial constitutional question requiring the convening of a three judge court has been raised, respondent assumes that the only question to be heard on the merits will be the jurisdictional issue. In addition, although petitioner purportedly reserved the right to raise a soverign immunity defense should the writ be granted (Pet. p. 11, note 4), respondent strongly opposes the granting of the writ on that issue which cannot be briefed unless it was presented in the petition. See Rule 23, Section 1(c) of the Rules of this Court. Moreover, as recognized by the Court of Appeals the sovereign immunity issue has long since been settled by this Court, and this case falls within the recognized exceptions to that doctrine (Pet. App. B. p. 35).